

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Media Bureau Seeks Comment on)	MB Docket No. 21-501
Implementation of the Television Viewer)	
Protection Act of 2019)	



COMMENTS

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COMMENTS

I. INTRODUCTION AND SUMMARY

ACA Connects hereby submits comments in response to the Federal Communications Commission (“Commission”) Media Bureau (“Bureau”) Public Notice¹ issued in the above-captioned proceeding. The Public Notice seeks comment on the “status of implementation” of two sections of the Television Viewer Protection Act of 2019 (“TVPA”) that have now been in effect for more than one year: the retransmission consent “buying group” provisions of Section 1003, and the “truth-in-billing” requirements for multichannel video programming distributors (“MVPDs”) and broadband providers set forth in Section 1004.² As an association representing smaller

¹ See *Media Bureau Seeks Comment on the Implementation of the Television Viewer Protection Act of 2019*, MB Docket No. 21-501, Public Notice, DA 21-1610 (2021) (“Public Notice”).

² See *id.*; see also *The Television Viewer Protection Act of 2019*, Pub. L. No. 116-94, 133 Stat. 2534 (2019).

providers of multichannel video and broadband services, ACA Connects is well-positioned to comment on the effectiveness and impact of both the buying group and truth-in-billing provisions of TVPA.

As we explain below, the buying group provisions and related implementing rules have largely served their limited purpose. In the past year, small MVPDs represented by ACA Connects have successfully relied on these rules to facilitate deals between the National Cable Television Cooperative (“NCTC”) and large broadcasters. These MVPDs have been able to achieve varying levels of cost savings as a result, though they continue to face much higher retransmission consent fees than large MVPDs, substantial fee increases each year, and frequent channel blackouts.

The TVPA truth-in-billing requirements have also been effectively implemented. ACA Connects Members have made the extensive changes to their systems and practices that were necessary to meet the requirements. More than one year later, ACA Connects Members report that they are operating successfully under the new requirements and that the customer impact has been modestly positive.

II. TVPA’S BUYING GROUP PROVISIONS HAVE LARGELY WORKED AS INTENDED, ALTHOUGH THE RETRANSMISSION CONSENT MARKET REMAINS BROKEN

The Public *Notice* seeks comment on TVPA’s “buying group” provisions that require “large station groups” to negotiate, pursuant to the “good faith” bargaining framework for retransmission consent, with “qualified MVPD buying groups” designated

by smaller MVPDs.³ In implementing these provisions, the Commission in May 2020 adopted rules that, among other things:

- Define the term “qualified MVPD buying group” as an entity that, with respect to a negotiation with a large station group for retransmission consent—
 - negotiates on behalf of two or more MVPDs—
 - none of which serves more than 500,000 subscribers nationally; and
 - that do not collectively serve more than 25 percent of all households served by MVPDs in any single local market in which the applicable large station group operates;⁴
- Define the term “large station group” to mean, in relevant part, an entity whose individual television broadcast stations collectively have a national audience reach of more than 20 percent.⁵

The Commission seeks comment on whether “the Commission’s rules implementing that provision have been effective in advancing the key purpose of the new good faith negotiation provisions . . . to level the playing field by ‘allow[ing] smaller MVPDs to collectively negotiate as a buying group [with large station groups] for retransmission

³ *Public Notice* at 2.

⁴ Implementation of Section 1003 of the Television Viewer Protection Act of 2019, 35 FCC Rcd 4961 ¶¶ 3-7 (2020) (“*Buying Group Report and Order*”)

⁵ *Id.* ¶ 6.

consent.”⁶ It also asks the extent to which “smaller MVPDs [are] utilizing these new provisions in retransmission consent negotiations with large station groups[.]”⁷

Before turning to the provision’s effectiveness, a few additional words about the historically *unlevel* playing field between smaller and larger MVPDs is in order. A recent FCC study, for example, showed that smaller MVPDs pay significantly higher retransmission consent fees than do larger MVPDs.⁸ Small cable operators (defined to be those with fewer than 500,000 subscribers) paid on average \$178.13 per subscriber per year in retransmission consent payments, while large cable operators (defined to be those with more than 500,000 subscribers) paid on average \$124.67 per subscriber, per year. Therefore, according to this data, small cable operators paid on average at least 43% more than larger operators—a number that almost certainly underestimates the true disparity between smaller and larger operators.⁹ And, according to the FCC, the disparity between small and large cable systems was only getting larger.¹⁰

⁶ Notice at 3.

⁷ *Id.*

⁸ FCC, *Consolidated Communications Marketplace Report, Appendix E*, Fig. 12 (“2020 Report”) <https://docs.fcc.gov/public/attachments/FCC-20-188A6.pdf>

⁹ As ACA Connects has observed previously, the Communications Marketplace Report does not control for the number of retransmission consent stations carried by a particular cable system. Smaller cable systems likely carry fewer retransmission consent stations because there are fewer such stations in rural areas. This means that, if such a small cable system pays the same as a larger cable system in total, it pays more per station. See Letter from Brian Hurley to Marlene Dortch, MB Docket No. 20-60 (filed June 30, 2020) (containing attachment from Professor William Rogerson of Northwestern University explaining the need for the Communications Marketplace Report to control for the number of retransmission consent stations carried per system)

¹⁰ An earlier report only presented data on retransmission consent fees broken down by size of the cable *system* but not by size of the *operator*. Communications Marketplace Report, Report, FCC No. 18-181, GN Docket No. 18-231, ¶¶ 70–75, (rel. Dec. 26, 2018). In comments on the 2020 Report, ACA Connects explained to the Commission that, since retransmission consent contracts are generally negotiated at the operator level, a more accurate measure of the magnitude of the disparity of fees could be obtained by providing a breakdown of fees paid by size of operator instead of size of system. Comments of ACA Connects—America’s Communications Association, GN Docket No. 20-60, at 9–11

Over the years, the National Cable Television Cooperative (“NCTC”), the primary buying group for the small- and medium-sized cable operators, had sought to diminish this retransmission consent price disparity by negotiating with broadcasters, but only cable programmers who owned broadcast stations (e.g., Disney/ABC, Comcast/NBC) were willing to enter into agreements. In these cases, the cable programmer/broadcaster benefited from negotiating retransmission consent as they do for cable networks because it reduced the transaction costs of dealing with many smaller MVPDs, making these costs comparable to those of dealing with a single large one.¹¹ Smaller MVPDs benefited because some of the broadcasters’ cost savings were passed through to MVPDs in the form of lower rates,¹² and these MVPDs could largely eliminate their own transaction costs. Despite NCTC’s attempts, other large station groups had refused to deal — and the then-existing good-faith negotiation rules provided no relief. The buying group provisions sought to remedy this, at least in part, by requiring large station groups to negotiate in good faith with buying groups like NCTC.

(filed Apr. 27, 2020). The 2020 Report presents data on fees broken down by operator size and this is the data discussed above. The 2020 Report also presents data broken down by system size and this data in the 2020 Report can be compared to the corresponding data in the 2018 Report to determine how the magnitude of the problem has changed since the last report. According to the 2018 Report, small cable systems (defined to be those serving fewer than 10,000 subscribers) paid 32% more in retransmission consent fees per subscriber than did large cable systems (defined to be those serving more than 75,000 subscribers). According to the 2020 Report, the magnitude of this disparity has increased to 37%.

¹¹ Buying group members also benefit by not having to spend their own time and resources negotiating their own individual deals, and being able to take advantage of the more experienced and skilled negotiators of the buying group.

¹² While buying groups can obtain lower prices than their members would obtain on their own, they do not receive the same volume discounts as large MVPDs even when a buying group can bring an equal number of subscribers to the deal.

In the year and a half since the buying group provision became effective, more than 628 MVPDs have relied upon the NCTC to negotiate with broadcasters. Under the umbrella of the provision, the NCTC reports having completed the following retransmission consent agreements with large station groups since passage of the TVPA:

- With Scripps, on behalf of 119 NCTC members that opted into the agreement.
- With Tegna on behalf of 274 members.
- With Gray on behalf of 442 members.
- With Meredith on behalf of 43 members.
- With Viacom/CBS on behalf of 59 members.
- With Sinclair on behalf of 387 members (renewing a previous agreement).

Only with Nexstar was NCTC interested in, yet unable, to reach an agreement. This, in part, was because Nexstar at one point refused to negotiate unless NCTC agreed to forgo rights given buying groups under the FCC's rules. To take just one example, Nexstar insisted that the negotiations be limited to NCTC members of a much smaller size than granted under the FCC rules.

It is fair to say that the buying group rule has largely accomplished the goals that Congress and the Commission set for it. Broadcasters (with one exception) did negotiate with NCTC as required and that, in turn, led to deals. Those buying group deals did result in less transaction costs for broadcasters and small MVPDs than the alternative of negotiating individual deals. And they surely resulted in lower prices for some of the smallest cable system operators, whose lack of experience and expertise in negotiating with large, sophisticated broadcasters might otherwise have resulted in

deals with exceptionally high rates or exceptionally disadvantageous terms. It likely also resulted in somewhat lower prices for NCTC's membership generally compared to what they might have paid in individual deals.

Yet the buying group provision did not—and never could have—meaningfully narrowed the gap between what large and small MVPDs pay for retransmission. After all, available evidence suggests that smaller providers that have purchased programming through buying groups have historically been paying significantly higher prices for cable programming than larger MVPDs.¹³ Nor did it rectify—or could have ever rectified—the broken retransmission consent market more generally. As ACA Connects has reported, the Commission's most recent marketplace report showed that, in 2019, cable operators paid 5.5 billion dollars in retransmission consent fees.¹⁴ This represented a 11.2% increase over *total* fees (and a 17.8% increase in *per* subscriber fees) paid the previous year at a time when the general rate of inflation, as measured by the Consumer Price Index, was 2.5%.¹⁵ This data comes from 2019. Yet we fully expect the next report to contain similar figures.

At the same time, according to the American Television Alliance, broadcasters blacked out their signal 219 times in 2019. The figure grew to an astounding 342 times

¹³ William Rogerson, *Economic Analysis of the Harms of the Proposed Comcast-NBCU Merger* at 42, *attached to* Comments of the American Cable Association, MB Docket No. 10-56 (filed June 12, 2010) (“I think that it is fair to say that it is an undisputed fact among industry participants and analysts that have access to these data, that programming agreements generally exhibit relatively significant quantity discounts. That is, holding all other factors constant, it is generally the case that larger MVPDs pay lower per subscriber fees for the same programming than do smaller MVPDs.”); *id.* at 42 n.5 (combining data from a news report with that from Bernstein research to support his conclusion).

¹⁴ *Communications Marketplace Report*, 36 FCC Rcd. 2945 App. E Fig. 10 (2020) (“2020 Marketplace Report”).

¹⁵ *Id.* ¶¶ 236, 234.

in 2020 but fell to 105 blackouts in 2021. Even this “low” number, however, represents an astonishing failure in the marketplace. In each case, cable and satellite subscribers who had done nothing wrong lost access to local news and network programming, just so the largest broadcasters could serve their bottom line.

Broadcasters, in other words, still have an incredible amount of leverage. The terms and conditions entered into by NCTC were by no means great for the small cable operators opting into them. But those deals involved lower transaction costs than individual negotiations would have and provided other benefits to small providers, and to varying degrees lower rates than individual negotiations would have produced.¹⁶

III. SMALLER MVPDS AND BROADBAND PROVIDERS HAVE SUCCESSFULLY IMPLEMENTED THE TVPA TRUTH-IN-BILLING REQUIREMENTS

The Public Notice also seeks comment on implementation of the truth-in-billing requirements of the TVPA, which are codified in Section 642 of the Act.¹⁷ As explained below, ACA Connects Members have made the extensive changes to their systems and practices that were necessary to implement these requirements. In their experience, these requirements are working effectively and have fulfilled their purpose.

Under Section 642, MVPDs are required to disclose the “total monthly charge” before entering a contract with a consumer to provide video service; to deliver a “formal

¹⁶ ACA Connects and the American Television Alliance, of which ACA Connects is a member, have elsewhere set forth their views on proposals to reform the retransmission consent marketplace. *See, e.g.*, Comments of the American Cable Association, MB Docket No. 15-216 (filed Dec 1, 2015) (ACA Connects retransmission consent proposals); Comments of the American Television Alliance, MB Docket No. 15-216 (filed Dec 1, 2015) (ATVA retransmission consent proposals); Further Comments of the American Television Alliance, MB Docket No. 18-349 (filed Sept. 2, 2021) (comments on retransmission consent in the context of ownership issues); Letter from Mary C. Lovejoy to Marlene Dortch, MB Docket No. 10-71 *et al.*, at 2 (filed Mar. 26, 2018) (providing additional information with respect to bundling).

¹⁷ See Public Notice at 2-3; *see also* 47 U.S.C. § 562.

notice” containing this information within 24 hours of entering the contract; and to allow the consumer to cancel the contract within 24 hours of the notice being sent without the consumer incurring cancellation fees or disconnection fees or penalties. The provision also requires MVPDs to include specific information in electronic bills, and it prohibits both MVPDs and broadband providers from assessing charges for equipment not actually provided to a consumer. The TVPA set June 20, 2020, as the effective date for these requirements, though it authorized the Commission to extend this deadline by six months for “good cause.”¹⁸

In an April 3, 2020 Order, the Bureau took the appropriate step of granting the contemplated six-month extension.¹⁹ As the Order recognized, service providers subject Section 642 had to contend with a number of implementation tasks in order to achieve compliance with its requirements.²⁰ Though the Order focused on the need to concentrate resources on addressing COVID-19 as a basis for granting the extension, the Bureau would have been more than justified in taking the same action even in the absence of the pandemic. As ACA Connects and others explained at the time, the volume and complexity of tasks involved in implementing the truth-and-billing

¹⁸ See TVPA, § 1004(b).

¹⁹ See *Implementation of Section 1004 of the Television Viewer Protection Act of 2019*, MB Docket No. 20-61, Order, 35 FCC Rcd 3008 (MB 2020).

²⁰ See *id.* ¶ 3 (“Compliance with the new truth-in-billing requirements in section 642 may require that subject entities make changes to existing billing systems, provide employee training, or take other compliance measures, thereby requiring providers to divert resources away from other consumer demands brought on by the pandemic.”).

requirements would have posed substantial barriers to meeting the June 20, 2020 deadline even under the best of circumstances.²¹

Most significantly, ACA Connects Members had to make significant changes to their billing systems to achieve compliance with the new requirements. In order to do so, they had to obtain and implement upgrades from the third-party vendors whose software platforms they rely on for billing services. After completing these upgrades and associated testing, many ACA Connects Members had to make updates to separate systems they use for bill printing. In addition, ACA Connects Members had to train customer service representatives and other personnel on the use of these systems and on compliance with the requirements in a variety of situations, including when taking orders in a retail store, over the phone, canvassing door-to-door, or online; as well as when installing service.

As ACA Connects witnessed firsthand, its Members devoted considerable resources, including staff hours, to completing these and other implementation tasks by the December 20, 2020 deadline, while also contending with an unprecedented public health crisis.²² For the smaller providers represented by ACA Connects, this was no small undertaking. More than one year later, ACA Connects Members report that the truth-in-billing requirements have been fully incorporated into their business operations and are working effectively.

²¹ See Joint Letter of ACA Connects, NCTA and USTelecom, MB Docket No. 20-61 (filed Mar. 26, 2020) (“Joint Letter”).

²² ACA Connects staff produced advisories, webinars, and other resources to help Members achieve compliance with the truth-in-billing requirements. These resources were popular among Members. ACA Connects staff also fielded many questions from Members about specific requirements.

Customer responses to the requirements have been generally favorable, but the overall impact of the requirements on the consumer experience appears to be modest. This outcome is not surprising. As noted in the Joint Letter, ACA Connects Members had strong incentives to achieve and maintain transparency in their sales and billing practices prior to the adoption of Section 642, and they had already implemented business practices tailored to achieving these ends.²³ Accordingly, while the adoption of the truth-in-billing requirements may have helped promote a baseline of transparency across the industry, it did not fundamentally change the way that ACA Connects members do business. In any event, the requirements have been implemented and are fulfilling their statutory purpose.

²³ See Joint Letter at 2.

IV. CONCLUSION

ACA Connects appreciates the opportunity to participate in this proceeding and encourages the Commission to take its comments into consideration.

Respectfully submitted,



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